MAY 7
MICHAEL ROBAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1664

JOHN B. BAILEY, INDIVIDUALLY AND ON BEHALF OF THE MEMBERS OF THE CLASS COMPOSED OF EMPLOYEES OF RESPONDENT, IOWA BEEF PROCESSORS, INC., AT ITS MASON CITY, IOWA, PLANT,

Petitioner.

vs.

IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

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Petitioner,

vs.

IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA.

Petitioner John B. Bailey prays that a Writ of Certiorari issue to review the judgment and opinion of the Iowa Supreme Court entered in this proceeding on December 19, 1973.

OPINIONS BELOW.

The opinion of the Iowa state trial court is unreported (*infra*, pp. A10-A12). The opinion of the Iowa Supreme Court is reported at 213 N. W. 2d 642 (*infra*, pp. A13-A23).

JURISDICTION.

The judgment of the Iowa Supreme Court was entered on December 19, 1973. On March 11, 1974, Mr. Justice Blackmun signed an order extending time for filing this petition for certiorari to and including May 7, 1974 (*infra*, p. A24). Jurisdiction is conferred on this Court by 28 U. S. C. § 1257(c).

QUESTION PRESENTED.

Do the employees of IBP have a right as third party beneficiaries to recover damages from IBP for breach of its contractual promise, contained in an antitrust consent decree, not to take any action with respect to its employees?

STATUTES INVOLVED.

Section Seven of the Clayton Act, 15 U. S. C. § 18, states, in relevant part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT OF THE CASE.

The Background.

In February 1969, Iowa Beef Processors, Inc.[1] (hereinafter referred to as IBP) merged with Blue Ribbon Beef Pack, Inc., thereby acquiring Blue Ribbon's beef packing plants in Le Mars and Mason City, Iowa. Immediately thereafter, the United States of America, acting through the Department of Justice, filed a complaint against IBP asserting, among other things, that the acquisition of these plants violated Section 7 of the Clayton Act, 15 U. S. C. § 18, and asking for divestiture of the plants by IBP. *United States of America* v. *Iowa Beef Packers,* Civil Case No. 69-C-3008-W, United States District Court for the Northern District of Iowa, Western Division.

An answer and amended complaint were filed. On March 23, 1970 Iowa Beef Processors, Inc. and the United States entered into an agreement whereby IBP agreed to sell within two years either the assets of Blue Ribbon Beef Pack, Inc. or the Mason City and Le Mars plants.[2] Iowa Beef Processors, Inc. also promised that it

> shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A).

This agreement was embodied in a consent decree entered by the United States District Court on March 23, 1970 (*infra,* pp. A5-A9).

On March 1, 1971 IBP ceased all production at its Mason City plant and laid off most of its production and maintenance employees without the approval of the Government or the consent of the Federal District Court. The Mason City plant remained closed until May 6, 1971, at which time the employees were recalled to work and production resumed.

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1. Iowa Beef Processors, Inc. was then known as Iowa Beef Packers, Inc.

2. Neither plant has yet been sold.

The Iowa State Court Proceeding.

On December 6, 1971, a complaint (denominated a "Petition at Law") was filed in the District Court for Cerro Gordo County (Iowa) by Petitioner John B. Bailey, individually and on behalf of all members of the class composed of the employees of IBP at its Mason City plant who were laid off from March 1 through May 6, 1971 (*infra*, pp. A1-A4). Petitioner was the duly elected President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, the certified collective bargaining agent for the production and maintenance employees in the plant.

The complaint alleged IBP's agreement to divest, its agreement to forebear from any action with respect to plant personnel which would impair its ability to divest, and its later shut-down of production. A copy of the consent judgment embodying the agreement between the Government and IBP was attached to the complaint (*infra*, pp. A5-A9). Finally, the complaint alleged that:

> The members of the class represented by plaintiff were third-party beneficiaries of the agreement between the defendant [IBP] and the United States. As a direct result of the breach of the aforesaid agreement by the defendant the members of the said class suffered damages through lost wages and other benefits of employment.

Petitioner prayed for judgment for wages and other benefits lost as a result of IBP's breach of its agreement with the Government.

IBP moved to dismiss the complaint on the grounds that the action impaired the Federal court's jurisdiction; that it was not prosecuted by a party in whose favor the judgment ran; and that Petitioner was not a third-party beneficiary, since the agreement embodied in the consent decree was not for his direct or primary benefit.

The trial court dismissed the complaint on the ground that the consent judgment was conditional, since the Federal court

retained the power to modify or terminate its provisions, and that no conditional judgment could be the basis of a recovery in law.

Decision of the Supreme Court of Iowa.

The Iowa Supreme Court affirmed the result, but not the rationale, of the trial court for three reasons:

1. Under the law of contract, the employees were not creditor beneficiaries.[3]
2. Analyzing Congressional interest in passing the Clayton Act, the Government did not intend to benefit IBP's employees when it obtained IBP's promise not to take any action with respect to its personnel.
3. Under the law of pleadings, the allegation that the Mason City employees were third party beneficiaries was found to constitute a mere conclusion of law.

Presentation of the Federal Question Below.

In its brief to the District Court of Cerro Gordo County, Petitioner raised the federal question herein as follows:

> The issue, as set forth in the formulation of the Restatement of the Law of Contracts, *supra,* is whether the United States government or, more particularly, the Antitrust Division of the Department of Justice acting as its agent, was satisfying an "actual or supposed or asserted duty" owed to the Mason City employees under Section 7 of the Clayton Act when it included in the consent decree the provision that IBP "shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A)."

---

3. The basis of this holding is unclear. The Court appears to rely on two findings: 1) that the parties to the consent degree did not intend to benefit the employees (a ground which merges with the statutory basis of the decision); and 2) that the employees were not mentioned in the contract, a finding which is not factually correct.

This federal question was phrased substantially the same way to the Iowa Supreme Court:

> In particular, was the Antitrust Division of the Department of Justice, as agent for the United States Government, satisfying an "actual or supposed or asserted duty" owed under Section 7 of the Clayton Act to the Mason City employees when it obtained IBP's promise to "continue the normal operations of Blue Ribbon and take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in Paragraph IV(A)."

The three asserted grounds of the Iowa Supreme Court decision below—contractual, statutory, and pleading—all reduce to a ruling on this federal question. The Court found that the Government neither had nor assumed any statutory obligation toward IBP's employees when it obtained IBP's promise concerning the personnel of its Mason City plant.

REASONS FOR GRANTING THE WRIT.

1. The Petition Presents Important Issues with Respect to the Rights of Private Parties to Enforce Antitrust Consent Decrees.

The Petition raises major policy issues concerning the nature and enforcement of consent decrees. Petitioner contends that where 1) a company voluntarily enters into a consent decree with the Government, 2) specifically promises thereby to take no action with respect to certain of its employees, and 3) thereafter openly violates its promise by ceasing production and laying off the employees, the affected employees should have a private right of action against the company as third-party beneficiaries to the contract embodied in the consent decree. Without such a right of action, the employer may with virtual impunity disregard explicit promises to the Government concerning the employees. That is precisely what IBP has done here.

Recognition that IBP's employees have the right of third-party beneficiaries to the consent decree voluntarily entered into by IBP would provide a legitimate and effective method of private enforcement of such decrees. Where the Government has obtained a company's promises designed to protect its employees, judicial acceptance of the employees' right to sue for breach of those promises would effectively complement the Justice Department's public enforcement resources.

Similar direct actions by employees as third-party beneficiaries of a contract between their employer and the Government have been frequently recognized in other areas. See, *e.g.*, *Hearn* v. *Ralph Sollitt & Sons Construction Co.*, 93 S. W. 2d 551 (Tex. Civ. App. 1936) (minimum wage provisions in contract for construction of courthouse and post office, with enforcement power only in Secretary of Labor); *Fryns* v. *Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 A. 862 (1933) (breach of Re-employment Agreement entered into with President of the United States pursuant to Section 4 of the National Industrial Recovery Act with relief for non-compliance only provided through suits by United States district attorneys); *Brown* v. *Bowers Construction Co.*, 236 N. C. 462, 73 S. E. 2d 147 (1952) (damage to private homes resulting from breach of construction contract provision concerning moving of homes).[4] Sound public policy as well as the traditional principles of contract law support the application of these concepts to antitrust consent decrees which contain specific promises with respect to employees.

It is important to emphasize what issues are *not* presented by this case. Petitioner's complaint against IBP does not involve any kind of claim against the Government with respect to its policies of antitrust enforcement. Further, recognition of Petitioner's claim would in no way hamper the Government's discretionary power to fashion consent decreees. It would simply

4. A number of other cases along the same lines were cited to the Iowa Supreme Court.

mean that when a company enters into a consent agreement with specific provisions for its employees, the company cannot thereafter violate its promises with relative impunity. Finally, Petitioner's case does not impinge upon the area of private treble damage actions under 15 U. S. C. § 15, or affect the proviso to 15 U. S. C. § 16(a) providing that a consent decree shall not be prima facie evidence of violation of the law in private antitrust actions. Petitioner and the class he represents do not ask for any damages resulting from conduct prior to the entry of the consent decree; they ask only for damages directly suffered as a result of IBP's breach of a specific promise made with respect to the employees themselves.

2. One of the Major Objectives of Section 7 of the Clayton Act Is to Protect Employment in Private Industry as a Means of Protecting Competition. Recognition That Employees Have the Right to Enforce a Consent Decree Provision Designed to Protect Them Would Significantly Further That Objective.

The language and the legislative and judicial history of Section 7 of the Clayton Act make clear that preservation of employment in local industry is and has been a major policy purpose of the Act, both for reasons of competitive effect and favorable geographical employment patterns. In *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 315-16 (1962), this Court stated:

> The dominant theme pervading congressional consideration of the 1950 amendment was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . . Other considerations cited in support of the bill were the desirability of retaining "local control" over industry and the protection of small business. Throughout the recorded discussion may be found examples of Congress' fear not only of accelerated concentration of economic power on economic grounds, but also of the threat of other values a trend toward concentration was thought to pose.

Justice Douglas made similar statements in his dissent in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 534 (1948), which case led directly to the Celler-Kefauver Act in 1950, as did Judge Learned Hand in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (2nd Cir. 1945). See also *United States* v. *Von's Grocery Co.*, 384 U. S. 270, 275-77 (1966); *United States* v. *Bethlehem Steel Corporation*, 168 F. Supp. 576, 583 (S. D. N. Y. 1958).

While the cases often talk in general terms of protecting local businesses, one of the most important facets of such protection is the preservation of a skilled and loyal work force. Preservation of the work force is particularly critical in the present circumstances, where IBP could circumvent the competitive thrust of the consent decree by ceasing business and dispersing its work force, thereby preventing any future operator of the Mason City plant from competing effectively. The Antitrust Division of the Department of Justice has a statutory duty and legislative mandate to safeguard the interests of the employees of local businesses. In obtaining IBP's promise not to take any action with respect to the personnel of its Mason City plant, the Antitrust Division was satisfying one of its basic statutory duties under the antitrust laws.

The consent judgment is essentially a contract between IBP and the Government, with the imprimatur of the court. *Timmons* v. *Holmes*, 249 Iowa 888, 89 N. W. 2d 371 (1958); *Van Donselaar* v. *Van Donselaar*, 249 Iowa 504, 87 N. W. 2d 311 (1958). See *United States* v. *Ward Baking Co.*, 376 U. S. 327, 334 (1964). It imposes restraints on IBP's rights to deal with its employees; in a word, the decree seeks to preserve the employment of IBP's employees. In requiring those provisions in the decree, the Government was acting under "an actual or supposed or assumed" duty to the employees derived from Section 7 of the Clayton Act. Under these circumstances the employees are third-party beneficiaries. Section 133, *Restatement of the Law of Contracts*, adopted by the Iowa courts in *Olney* v. *Hutt*, 251 Iowa 1379, 105 N. W. 2d 515 (1960).

CONCLUSION.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Iowa Supreme Court.

Respectfully submitted,

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May 7, 1974.

APPENDIX

IN THE DISTRICT COURT OF IOWA
In and For Cerro Gordo County

JOHN B. BAILEY, Individually and as President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, on behalf of the members of the class composed of employees of the Defendant IOWA BEEF PROCESSORS, INC. at its Mason City, Iowa plant,

Plaintiff,

vs.

IOWA BEEF PROCESSORS, INC.,

Defendant.

No. 42939 Law

PETITION AT LAW

The plaintiff, John B. Bailey, individually and as President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, on behalf of the members of the class composed of employees of the defendant Iowa Beef Processors, Inc. at its Mason City, Iowa plant complains of the defendant Iowa Beef Processors, Inc. as follows:

1. The plaintiff brings this action on his own behalf and as the representative of a class composed of the employees of the defendant Iowa Beef Processors, Inc. at its Mason City, Iowa plant who were laid off from on or about March 1, 1971, until on or about May 6, 1971. Plaintiff is the duly-elected President of Local 1196, Amalgamated Meat Cutters and

Butcher Workmen of North America, AFL-CIO, the certified collective bargaining agent for all of the production and maintenance employees of the defendant Mason City, Iowa plant.

2. The defendant is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Dakota City, Nebraska and is doing business in Mason City, Cerro Gordo County, Iowa. Defendant is engaged in the business of buying and slaughtering cattle and producing and selling beef and beef by-products and at all times mentioned in this complaint operated, and continues to operate, a plant in Mason City, Iowa.

3. On March 20, 1970, the defendant and the United States of America in a proceeding in the United States District Court for the Northern District of Iowa, Western Division, case No. 69-C-3008-W, entitled *United States of America* v. *Iowa Beef Packers, Inc. and Blue Ribbon Beef Pack, Inc.* entered into an agreement under which the defendant Iowa Beef processors, Inc. is required to sell the two plants at Le Mars and Mason City, Iowa it acquired through a merger with Blue Ribbon Beef Pack, Inc. on or about February 26, 1969. Pursuant to the terms of this agreement the defendant is required to complete the divestiture, through a sale or sales, of these two plants on or before March 20, 1972. This agreement was embodied in a final judgment entered by the United States District Court on March 20, 1970.

4. A true and complete copy of the final judgment entered in *United States of America* v. *Iowa Beef Packers, Inc., et al.*, 69-C-3008-W, is annexed to this Complaint as Exhibit A and incorporated herein by reference.

5. Paragraph IV of said agreement is as follows:

> (A) Within two years from the date of this Final Judgment, IBP shall sell, upon terms and conditions to be approved by the Court, to an eligible purchaser or purchasers either the assets of Blue Ribbon as a going business

or the Mason City and Le Mars plants of Blue Ribbon separately as going businesses.

(B) In accomplishing the divestiture ordered by paragraph IV(A), IBP shall make known the availability for sale of the Blue Ribbon assets by ordinary and usual means and it shall employ one or more brokers to assist it in such divestiture. IBP shall furnish to all bona fide prospective purchasers all necessary information, including current financial statements regarding the Blue Ribbon assets and operations and shall permit such prospective purchasers to make such inspection as may be reasonably necessary.

(C) Pending any sale pursuant to the terms of this Final Judgment and subject to the provision of this Court's order of October 6, 1969, IBP shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A).

6. On or about March 1, 1971, the defendant closed down all production at its Mason City plant and laid off most of its production and maintenance employees. The aforesaid closing down of its production at its Mason City plant and the consequent laying off of its employees who constitute the class represented by the plaintiff was not a continuation of the defendant's normal operations and impaired defendant's ability to accomplish divestiture under Paragraph IV(A) of Exhibit A and, therefore, the defendant breached the agreement and, in particular, Paragraph IV(C) thereof.

7. The defendant's plant at Mason City remained closed for the purposes of slaughtering cattle and producing beef and beef by-products until on or about May 6, 1971, at which time the defendant resumed production and the members of the class represented by plaintiff were recalled to work

8. The members of the class represented by plaintiff were third-party beneficiaries of the agreement (Exhibit A) between the defendant and the United States. As a direct result of the breach of the aforesaid agreement by the defendant the members of the said class suffered damages through lost wages and other benefits of employment.

WHEREFORE, plaintiff prays that this Court enter judgment against the defendant in favor of each member of the class represented by the plaintiff for lost wages and other benefits as a result of defendant's breach of Paragraph IV(A) of Exhibit A, costs of this suit and such further relief as the Court deems just.

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Exhibit "A"

UNITED STATES DISTRICT COURT
For the Northern District of Iowa
Western Division

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* IOWA BEEF PACKERS, INC., *Defendant.*	Civil No. 69-C-3008-W

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on February 24, 1969, and defendant, Iowa Beef Packers, Inc., having filed its Answer thereto, and plaintiff having filed its amended complaint on December 5, 1969; and plaintiff and defendant, Iowa Beef Packers, Inc., having consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any such issue;

NOW, THEREFORE, before the taking of any testimony, without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto it is hereby ORDERED, ADJUDGED and DECREED as follows:

I.

This Court has jurisdiction of the subject matter of this action and of the parties hereto. The amended complaint states a claim upon which relief may be granted against the defendant under Section 7 of the Act of Congress of October 15, 1914, as amended (15 U. S. C. § 18), commonly known as the Clayton Act.

II.

As used in this Final Judgment:

(A) "IBP" means defendant, Iowa Beef Packers, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal office in Dakota City, Nebraska.

(B) "Blue Ribbon" means the former Blue Ribbon Beef Pack, Inc., acquired by IBP on August 1, 1969.

(C) "Eligible purchaser" means a person which represents that it intends to operate Blue Ribbon or the Blue Ribbon facilities as an operating business in competition with other firms engaged in the slaughter and processing of fed cattle and which is approved by plaintiff, or failing such approval, by the Court.

III.

The provisions of this Final Judgment applicable to defendant shall apply to such defendant, its subsidiaries, successors and assigns and to each respective officer, agent, servant, employee and to all persons in active concert or participation with defendant who receive actual notice of this Final Judgment by personal service or otherwise. None of the provisions of this Final Judgment shall apply to any person or persons which acquires any of the assets disposed of pursuant to this Final Judgment.

IV.

(A) Within two years from the date of this Final Judgment, IBP shall sell, upon terms and conditions to be approved by the Court, to an eligible purchaser or purchasers either the assets of Blue Ribbon as a going business or the Mason City and Le Mars plants of Blue Ribbon separately as going businesses.

(B) In accomplishing the divestiture ordered by paragraph IV(A), IBP shall make known the availability for sale of the Blue Ribbon assets by ordinary and usual means and it shall employ one or more brokers to assist it in such divestiture. IBP

shall furnish to all bona fide prospective purchasers all necessary information, including current financial statements regarding the Blue Ribbon assets and operations and shall permit such prospective purchasers to make such inspection as may be reasonably necessary.

(C) Pending any sale pursuant to the terms of this Final Judgment and subject to the provision of this Court's order of October 6, 1969, IBP shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair IBP's ability to accomplish the divestiture ordered in paragraph IV(A).

(D) The divestiture ordered in paragraph IV(A) shall be made in good faith and shall be absolute and unqualified; provided, however, that IBP may accept and enforce any bona fide lien, mortgage, deed of trust or other form of security on all or any portion of the divested assets given for the purpose of securing to IBP payment of any unpaid portion of the purchase price thereof or performance of the sale transaction and may also enforce any other terms and conditions of the sale transaction as therein provided or as provided by law. In the event that IBP, as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security, reacquires possession of the divested assets, then IBP shall be required thereafter to divest itself of such assets in accordance with the terms of this Final Judgment.

(F) Following the entry of this Final Judgment and continuing until completion of the divestiture ordered by paragraph IV(A) IBP shall render bi-monthly reports to the Assistant Attorney General outlining in detail the efforts made by it and by its broker or brokers to accomplish the divestiture ordered in paragraph IV(A). The first such report shall be rendered within sixty (60) days after the date of entry of this Final Judgment.

V.

IBP is enjoined and restrained for a period of ten (10) years from the date of entry of this Final Judgment from acquiring all, or any part of the assets (other than assets acquired in the ordinary course of business) or all or any part of the stock of any individual, partnership, firm, corporation, association or other business or legal entity engaged in the business of slaughtering or processing fed cattle in the States of Iowa, Nebraska, Minnesota or South Dakota without the consent of the Department of Justice or failing such consent, the approval of the Court upon a showing that such acquisition may not substantially lessen competition or tend to create a monopoly.

VI.

For the purpose of securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon the written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, upon reasonable notice to the defendant made to its principal office, be permitted:

(a) access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession of or under the control of said defendant relating to any of the matters contained in this Final Judgment; and

(b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview the officers and employees of defendant, who may have counsel present, regarding any such matters.

For the purpose of securing compliance with this Final Judgment, the defendant, upon the written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, made to its principal offices, shall submit

such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the enforcement of this Final Judgment.

No information obtained by the means provided in this Section VI shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the Plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VII.

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

/s/ WILLIAM C. HANSON
United States District Judge

Dated: March 20, 1970
Sioux City, Iowa

IN THE DISTRICT COURT OF IOWA
In and For Cerro Gordo County

JOHN B. BAILEY, Individually and as President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, on behalf of the members of the class composed of employees of the Defendant IOWA BEEF PROCESSORS, INC., at its Mason City, Iowa, plant,

Plaintiff,

vs.

IOWA BEEF PROCESSORS, INC.,

Defendant.

No. 42939.

RULING ON MOTION TO DISMISS

Be it remembered that on the 23rd day of March, 1972, defendant's Motion to Dismiss is argued by John M. Bowlus and Harry H. Smith, plaintiff's counsel; and P. L. Nymann, defendant's counsel.

And now on this 29th day of March, 1972, the Court makes the following findings and ruling thereon.

This action is brought by plaintiffs as third-party beneficiaries of the United States District Court consent judgment entered March 7, 1970, and the agreement thereby claimed to be existing between United States of America, Plaintiff and Iowa Beef Packers, Inc., Defendant, Civil Cause No. 69-C-3008-W for the Northern District of Iowa, Western Division. A copy marked Exhibit "A" of the Judgment is attached to plaintiffs' petition.

The Judgment referred to, and hereinafter referred to as the IBP Judgment, requires defendant to divest itself of its

Mason City plant, plaintiffs' employer, within two years; and that pending any sale IBP "shall continue the normal operations of Blue Ribbon and take no action with respect to the personnel or assets of Blue Ribbon (which includes the Mason City plant) which would impair IBP's ability to accomplish the divestiture."

Plaintiffs' action herein for damages is based upon an alleged violation of the above provision by the closure of the Mason City plant from March 1, 1971, to May 6, 1971, when production was resumed.

The Motion to Dismiss states the three grounds, (1) the federal court has retained jurisdiction for the construction, modification or termination of any of the provisions of its judgment, (2) this action is not prosecuted by a real party in interest; and, (3) plaintiffs are not entitled to sue as third-party beneficiaries as the alleged "agreement" was not for plaintiffs' direct or primary benefit, only their indirect, collateral or consequential benefit, if any.

The IBP Judgment concludes with Paragraph VII, which provides: "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof."

DuBois v. *Seymour*, 152 Fed. 600, 603, and related case *DuBois* v. *Mayor of New York*, 134 Fed. 570, had before it in the two actions the question of adjustment of contingent fees and the adjustment of such fees on termination of the employment prior to conclusion of the work and the substitution of new counsel. The court in the first case merely provided that it was within the discretion of the court to make an order granting plaintiff therein a substitution of attorneys conditional on plaintiff's payment of a reasonable compensation for the services

already rendered and for their disbursements. On the suit to recover such fees in the later case, the court held: "Final decrees of courts of equity have the same conclusive effect as to questions of fact determined by them as judgments at law. If a final decree adjudges a fixed and certain sum to be due and owing from the defendant to the complainant, and nothing more, an action at law may be maintained on it for the recovery of the sum so adjudged to be due and owing; *but the decree must be an unconditional one*. The specific sum of money adjudged to be due must be payable, in all events. If there be a condition annexed to the decree which renders it uncertain whether payment will ever be obligatory, the decree is not a record on which the common law action of debt, or any other action at law instituted for the purpose of recovering a debt can be founded." See also *McClain* v. *Parker* (Kan.), 129 P. 1140, 1141.

Assuming, but not deciding, that plaintiffs are proper parties here, this is merely secondary to the primary question upon which ground (1) of the motion rests. It is not necessary to belabor the clear conclusion that the IBP Judgment is conditional. It is not only conditional, but the conditions also are without clear limitation as the court granting it may on application not only modify but also *terminate* any of its provisions.

It is plain this judgment is not a record upon which this action to recover lost wages and benefits can be founded.

Accordingly, it is ordered and adjudged that plaintiffs' petition should be and the same is dismissed at plaintiffs' costs, taxed by the Clerk in the sum of $21.25.

/s/ L. E. PLUMMER
Judge of the 2nd Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

JOHN B. BAILEY, Individually and as President of Local 1196, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, on behalf of the members of the class composed of employees of the Defendant, Iowa Beef Processors, Inc., at its Mason City, Iowa, plant.

Appellants,

vs.

IOWA BEEF PROCESSORS, INC.,

Appellee.

Filed December 19, 1973

No. 55684

HARRIS, *J.*

A class action was brought claiming members of a labor union were creditor beneficiaries under a contract providing for a consent decree previously entered in federal court. Trial court sustained a motion to dismiss. We affirm.

On February 24, 1969 the United States government filed an action in the United States district court under section 7 of the Act of Congress of October 15, 1941. That Act will hereafter be called the Clayton Act. The provision upon which the action in federal court was grounded appears as 15 U. S. C., section 18 as amended. Defendant, Iowa Beef Processors, Inc., (hereafter called defendant) was charged under the antitrust provisions of the Clayton Act with having improperly acquired two packing plants from Blue Ribbon Pack, Inc. of LeMars and Mason City. The action in federal court resulted in a consent decree which required defendant to sell the packing plants in Mason City and LeMars within two years upon

terms and conditions to be approved by the court. It also provided:

> "Pending any sale pursuant to the terms of this Final Judgment and subject to the provision of this Court's order of October 6, 1969, [defendant] shall continue the normal operations of Blue Ribbon and shall take no action with respect to the personnel or assets of Blue Ribbon which would impair [defendant's] ability to accomplish the divestiture * * *."

The decree further provided for the retention of jurisdiction in federal court for enforcement, construction, modification or termination of any of its provisions.

The decree was entered March 23, 1970. On March 1, 1971 defendant closed down all production at its Mason City plant and laid off most workers. The plant remained closed until May 6, 1971 when all employees were recalled to work. On December 6, 1971 plaintiff brought this suit against defendant in which he claims the "* * * closing down of its production of its Mason City plant and the consequent laying off of its employees who constitute the class represented by the plaintiff was not a continuation of defendant's normal operations and impaired defendant's ability to accomplish divestiture * * *."

Plaintiff, individually and as president of a labor union, brought this action on behalf of the members of the class composed of employees of defendant at the Mason City plant. In his petition plaintiff claimed members of the class were third-party beneficiaries of the agreement providing for the consent decree. The petition alleged the agreement was "embodied" in the final judgment, a copy of which was attached to the petition.

Defendant based its motion to dismiss on two grounds. In the first ground defendant pointed out the federal court had retained exclusive jurisdiction for enforcement of and compliance with its decree. Defendant argues the state court therefore had no jurisdiction to entertain this suit. In sustaining the

motion to dismiss the trial court adopted this argument and did not reach the second ground. Defendant's second ground claimed the members of plaintiff's class were not third-party creditor beneficiaries under any agreement between the federal government and defendant. We disagree with the trial court as to the first ground but we think the case must be affirmed on the second.

I. As indicated, the federal court retained jurisdiction for enforcement of the consent decree. We do not believe this retention vested the federal court with exclusive jurisdiction to entertain plaintiff's present suit. The trial court believed the retention provision rendered the consent decree conditional rather than final. But a provision for retention of jurisdiction is effective in accordance with its wording. *Des Moines Terminal Co.* v. *Des Moines Union Ry. Co.*, 52 F. 2d 605, 613. The retention provision in the consent decree was as follows:

> "Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof."

Neither plaintiff nor the class he represents claim to have been parties to the federal action. They are not mentioned in the decree. Under the rule in *Des Moines Terminal Co.* v. *Des Moines Union Ry. Co.*, supra, we interpret the language of the retention provision to fall short of plaintiff's claim. The claim lies outside things necessary or appropriate for the construction or carrying out of the decree. It lies outside things necessary for its modification or termination. We do not agree the case should be dismissed because of exclusive federal jurisdiction under the retention clause.

II. The trial court should however be affirmed because the second ground of the motion to dismiss should have been sustained. This was the ground in which defendant asserted any agreement between it and the federal government "* * * was not for the direct or primary benefit of plaintiff or his class." Defendant insisted any benefits accruing to plaintiff's class were only incidental, collateral, or consequential. We agree.

It is the rule in Iowa and in most American jurisdictions "* * * that a third person may, in his own right and name, enforce a promise made for his benefit even though he is a stranger both to the contract and to the consideration." 17 Am. Jur. 2d, Contracts, section 302, page 722. The right of a third-party beneficiary to sue in Iowa can be traced through a long line of cases. These were collected and discussed in some detail in *Olney* v. *Hutt*, 251 Iowa 1379, 105 N. W. 2d 515, in which we cited with approval Restatement, Contracts, section 133, page 151. Both parties have cited *Olney* and the Restatement section it approves. In adopting the Restatement rule we interpreted it in the light of our earlier cases and text authorities. The right of a third-party beneficiary to sue in Iowa was recognized even though he was not shown to have known of the contract at the time it was made. *Baker* v. *Bryan*, 64 Iowa 561, 21 N. W. 83. In *Davis* v. *The Clinton Water Works Co.*, 54 Iowa 59, 6 N. W. 126, we emphasized the necessity of privity between the parties. We stated "* * * if mere strangers may enforce the contract by actions, on the ground of benefits flowing therefrom to them, there would be no certain limit to the number and character of actions which would be brought thereon." In *German S. Bk.* v. *N. W. Water & L. Co.*, 104 Iowa 717, 74 N. W. 2d 685, the right of a person to sue as a third-party beneficiary was limited to those cases where the person for whose benefit the promise was made "has the sole exclusive interest in its performance." Also cited in *Olney* v. *Hutt*, supra, were text statements from 12 Am. Jur., Contracts, section 281, page 833; 17 C. J. S., Contracts, section 519(c),

page 1127, et seq.; and 13 C. J. Contracts, section 817, page 709.

It might be suggested more recent developments in contract law accord third-party beneficiary status in more situations than were indicated in our earlier decision, particularly in *Davis* v. *The Clinton Water Works Co.*, supra, and *German S. Bk.* v. *N. W. Water & L. Co.*, supra. But the rule as it has been developed throughout the country is not without limitations. See the following sections from 17 Am. Jur. 2d, Contracts, section 304, page 727, section 305, page 730, section 307, page 732, section 311, page 739, and section 315, page 743. Especially appropriate is the following:

> "As a general proposition, the determining factor as to the rights of a third-party beneficiary is the intention of the parties who actually made the contract. The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts. Thus, it is often stated that the contract must have been intended for the benefit of the third person in order to entitle him to enforce it.
>
> "* * * The intention of the parties in this respect is determined by the terms of the contract as a whole, construed in the light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish.
>
> "Although the above statements are clear enough as broad statements of principle, it is not always clear as to just what is meant when the courts say that there must be an intent to benefit the third person or that the intention of the parties is controlling. * * * A provision in a contract that it was made for the benefit of a third person or that he should have the right to enforce the same would clearly indicate the intention of the parties that the promise should inure to the benefit of the third person. * * * It has been indicated that the contracting parties must have intended to confer an actionable right upon the third person. Moreover, it has been declared that for anyone to be a third-party beneficiary entitled to recover on a con-

> tract both parties to the contract must so intend *and must indicate that intention in the contract.* * * * [A] contract will not be construed as having been made for the benefit of a third person unless it clearly appears that such was the intention of the parties. * * * " (Emphasis added) 17 Am. Jur. 2d, Contracts, section 304, pages 727-730.

We see nothing in fundamental contract law which aids plaintiff in his claim that his employees, unmentioned in the contract, were creditor beneficiaries.

III. Plaintiff argues the nature and purpose of the Clayton Act itself accords them the status he claims. He cites various cases which have interpreted the Clayton Act, especially *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 8 L. Ed. 2d 510, 82 S. Ct. 1502; *United States* v. *Bethlehem Steel Corp.,* 168 F. Supp. 576; *United States* v. *Von's Grocery Co.,* 384 U. S. 270, 16 L. Ed. 2d 555, 86 S. Ct. 1478. The authorities plaintiff cites do not reach or support the position he takes. They are authority only that the purpose of the Act is to preserve competition in industry sometimes but not always in small units. In *Brown Shoe Co.* v. *United States,* supra, the dominant theme of congressional consideration of the Clayton Act was said to be "* * * a fear of what was considered to be a rising tide of economic concentration in the American economy. * * *."

It does not follow plaintiff's union members were creditor beneficiaries of the agreement. Plaintiff argues "* * * [o]bviously, their immediate, vital interests were at stake. * * * It is offensive—logically and morally—to suggest that if employees lose their jobs as a result of a breach of an agreement between their employer and the Government that somehow their interests have been only 'collaterally' or 'incidentally' affected. The plant obviously could not operate—and consequently [defendant] could not discharge the contractual mandate to which it had committed itself—if there were no hourly employees to slaughter the beef and dress the carcasses."

Plaintiff misconstrues the distinction between creditor and incidental beneficiaries. The distinction is not based on how strongly or adversely one might be affected by the breach of a contract. The distinction, as indicated in the previous division, depends on whether the contracting parties had and expressed the purpose to bestow a benefit on the third person. Any person claiming to be a third-party beneficiary to a contract is bound to feel vitally interested in it. Such a person will always feel more and more vitally interested as the economic stakes increase. However, the economic consequences do not necessarily relate to the controlling question of whether the parties who entered the contract intended and expressed an intention to benefit those claiming to be third-party beneficiaries.

There is no indication in the Act or in the authorities which interpret it that congress intended employment opportunities to be any more than incidental benefits arising from the enforcement of the Act. The fundamental purpose of the Act was to control monopolies for the direct economic benefit of the entire public. Plaintiff cites no authorities and we find none which support a contention that the job opportunities of defendant's employees were any factor in the enactment or enforcement of the Act. Indeed, there is no claim or indication the defendant would offer fewer or poorer jobs if it had succeeded in achieving what the government claimed was a monopoly.

This interpretation is supported by the language of the decree itself which couples with the requirement of continued normal operations the further requirement defendant should "* * * take no action with respect to personnel or assets of Blue Ribbon which would impair [defendant's] ability to accomplish the divestiture. * * *." This is a strong indication the continued normal operations were required and agreed upon by the parties for the primary purpose of keeping the assets of Blue Ribbon attractive to potential purchasers so as to make the sale practicable.

We find nothing in the Clayton Act or in the authorities which interpret it to indicate employees of involved parties are given any more or any less from resulting decrees than is given any other citizen. The Act gives each citizen whatever protection it can against the monopolistic concentration of economic power. It should do no less and seeks to do no more. No special protections are accorded plaintiff's class or any other class.

IV. We must finally consider the effect of the broad assertion in the petition that plaintiff's employees were third-party beneficiaries under the contract entitled to bring this action. No motion to strike this assertion was combined under rule 111, Rules of Civil Procedure. See *Hutchinson* v. *Des Moines Housing Corp.*, 248 Iowa 1121, 84 N. W. 2d 10. We must determine whether the assertion by plaintiff of the third-party beneficiary status must be accepted as true. He alleges no underlying facts to support such a claim; he merely sets out the federal court decree and makes the claim the employees he represents are creditor beneficiaries under the agreement for the decree.

Even the most extravagant factual averment is dignified into a verity when exposed to a motion to dismiss. Our cases are legion which hold we take as true all well pleaded facts in a petition when considering a motion to dismiss. In reviewing the motion we examine the petition "* * * to determine whether it appears to a certainty [plaintiff] * * * failed to state a claim on which any relief may be granted under any state of facts which could be proved in support of the claims asserted * * *. (Authorities)," *Freese* v. *Lemmon*, 210 N. W. 2d 576, 579 (Iowa 1973).

We have acknowledged some difficulty in reconciling our early cases dealing with the pleading of conclusions. See *Bindel* v. *Iowa Manufacturing Co. of Cedar Rapids*, 197 N. W. 2d 552 (Iowa 1972) where at page 554 we said:

> "Much has been written regarding construction of pleadings when attacked by a motion to dismiss. Our earlier cases create some uncertainty as to the applicable rules. However, it is now well settled that where a doubtful plead-

> ing is attacked by motion before answer doubt will be resolved against the pleader. This rule is qualified by the additional provision that if the petition does allege ultimate facts upon which plaintiff might recover and states a claim under which evidence may be introduced in support thereof, the petition should be construed in the light most favorable to the plaintiff with doubts resolved in his favor and the allegations accepted as true. (Citations)."

We have consistently held a motion to dismiss (a demurrer in earlier cases) admits only *well pleaded facts.* Conclusions of law or conclusions of fact have not been allowed except where underlying facts are first alleged. In *Benton* v. *Morningside College,* 202 Iowa 15, 209 N. W. 516, Justice Albert stated the rule to be "* * * making of this motion [to dismiss] confesses * * * all facts in the pleading well pleaded, but does not confess conclusions of law set out in the pleading or conclusions of fact, except where the facts, from which the conclusions of fact logically follow, are set out."

We stated the rule in a similar way more recently in *Meester* v. *Roose,* 259 Iowa 357, 144 N. W. 2d 274 as follows:

> "While a motion to dismiss admits the truth of all well pleaded issuable and relevant facts, it does not admit mere conclusions of fact or law not supported by allegations of ultimate fact. Also, doubtful pleadings when challenged by such a motion will be resolved against the pleader. (Citations)." 259 Iowa at 359, 144 N. W. 2d at 275.

In *Benton* v. *Morningside College, supra,* we pointed out:

> "There seems to be some confusion over the question of whether a conclusion may be made in a pleading. We conceive the rule to be that, where the facts which lead to a logical conclusion are recited in full, a pleading so setting out the facts, followed by the conclusion of the pleader, is a proper pleading, but the setting out of the conclusion without facts supporting it makes a bad plea. (Citations) * * *." 202 Iowa at 21, 209 N. W. at 519.

We believe the term ultimate facts was properly defined in *Johnson* v. *Johnson*, 92 Mont. 512, 515, 15 P. 2d 842, 844 to be "[t]he issuable, constitutive, or traversable facts essential to statement of cause of action."

The term "ultimate fact" as used in the law of pleading is sometimes improperly confused with the term "ultimate question" in the trial of a suit. The use of the adjective "ultimate" in no way makes the terms similar. A familiar trial rule makes it improper to ask a witness a question which calls for the ultimate fact to be determined at trial. 98 C. J. S., Witnesses, section 340(c), page 52. The term ultimate fact as used in the law of pleading was well explained in McCarty Iowa Pleading, section 29, page 22 as follows:

> "The statement or pleading of a party showing his right of action must show operative facts entitling him prima facie to a remedy. 'Operative facts are (1) such acts and events as operate under the law to invest some one with a legal right, and are hence called investitive facts; (2) such as operate to divest some one of a legal right, and hence are called divestitive facts; and (3) such as work a wrongful interference with an existing legal right and hence are called culpatory facts. And such facts as in their nature tend to prove or disprove the existence of any of the operative facts aforesaid are called evidential facts.' (Citing Phillips Code Pleading, page 2).
>
> "Many writers use the term 'ultimate facts' to designate facts to be pleaded as distinguished from evidential facts, but Judge Phillips' term 'operative' seems preferable. He says further: 'Operative facts are those to which the substantive law annexes consequences. They are facts from which proceed rights and obligations and wrongs. They are the facts which enter into and create jural relations between persons; * * * and these facts, because they operate under the law to create rights and obligations are called operative facts.' (Citing Phillips Code Pleading, page 166)." See also Winneshiek Mutual Ins. Assn. v. Roach, 257 Iowa 354, 132 N. W. 2d 436; and 61 Am. Jur. 2d, Pleading, section 17, page 468.

Plaintiff's claim the employees he represents are third-party beneficiaries under the contract is an allegation as to status. "General allegations as to the status and condition of persons or corporations, without stating the facts to support such allegations, are usually mere conclusions of law; * * *." 71 C. J. S., Pleading, section 27(a), page 67. (But see rule 98, R. C. P.). The allegation is not well pleaded and must be ignored in considering defendant's motion to dismiss. Plaintiff alleges insufficient facts to support his claim and it was accordingly properly dismissed.

V. Plaintiff is not supported in his claim by the law of contract by the Clayton Act itself or by the law of pleading. The judgment of the trial court is affirmed.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. A-857

JOHN B. BAILEY, ETC.

Petitioner,

vs.

IOWA BEEF PROCESSORS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 7, 1974.

/s/ HARRY A. BLACKMUN
Associate Justice of the Supreme Court of the United States

Dated this 11th day of March, 1974